Supreme Court, U.S.
FILED
MAY 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1431

In the Supreme Court of the United States

OCTOBER TERM, 1985

PRYOR BOLTON AND GLEN MCCULLAH d/b/a PRYOR AND GLEN COAL CO., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Graham v. *Office of Surface Mining Reclamation & Enforcement*, 722 F.2d 1106 ... 2

Greene v. *Lindsey*, 456 U.S. 444 4

Mennonite Board of Missions v. *Adams*, 462 U.S. 791 3

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 ..... 3, 4

United States v. *Crews*, 740 F.2d 969, cert. denied, No. 84-749 (Jan. 14, 1985) 2

Constitution, statutes and regulations:

U.S. Const. Amend. XIV (Equal Protection Clause) 5

Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (& Supp. II) 1201 *et seq.* 2

§ 518(c), 30 U.S.C. 1268(c) 2, 3

30 C.F.R. :

Section 722.14 3

Section 722.14(a)(2) 3

Section 723.17 3

Section 723.17(b) 3

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1431

PRYOR BOLTON AND GLEN MCCULLAH d/b/a PRYOR AND GLEN COAL CO., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the United States may not collect a civil penalty assessed against them for violations of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (& Supp. II) 1201 *et seq.*, because they refused to accept various notices regarding the violations that were sent to them by certified mail.

1. Petitioners began coal mining operations in September 1979 at a site in Tennessee without obtaining the required permit. Inspectors visited the site in October 1979 and issued a cessation order and a notice of violation. They tendered copies of those documents to petitioner Bolton at the mine site, but he refused to accept them. Copies of the cessation order and the notice of violation, along with a notice of proposed assessment of civil penalties, were then sent to petitioners' business address by certified mail, but were returned marked "refused." Pet. App. 79-80.

An inspection in 1980 revealed that the mining operation had been abandoned without reclamation. Another cessation order, notice of violation, and notice of proposed assessment of civil penalties were issued and sent to petitioners by certified mail. The documents sent to Bolton were returned marked "refused," the documents sent to McCullah were returned marked "unclaimed," and the documents sent to their business address were returned marked "out of business." A second inspection in 1980 showed that the mine site remained abandoned and unreclaimed. Another cessation order and another notice of proposed assessment of civil penalties were issued. Although again sent to petitioners by certified mail, the documents were again returned. Pet. App. 81-82.

2. After a final penalty assessment order and a demand letter were sent to petitioners by certified mail and returned marked "refused" (Pet. App. 83), the United States brought this action to collect the civil penalties that had been assessed, which amounted to $199,800 (*id.* at 120). Section 518(c) of the Surface Mining Control and Reclamation Act, 30 U.S.C. 1268(c), provides that, after the Secretary informs the mine operator of the proposed amount of the penalty for a violation, "[t]he person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account." Section 518(c) also provides that "[f]ailure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty."[1] Since petitioners

---

[1]The courts of appeals have uniformly upheld the validity of the prepayment requirement of Section 518(c). See, *e.g.*, *Graham* v. *Office of Surface Mining Reclamation & Enforcement*, 722 F.2d 1106, 1111 (3d Cir. 1983); *United States* v. *Crews*, 740 F.2d 969 (6th Cir. 1984) (Table), cert. denied, No. 84-749 (Jan. 14, 1985).

had failed to pay the penalties within 30 days after the notices of assessment of penalties were sent to them, as required by Section 518(c), the government contended that they had waived their right to contest these penalties and moved for summary judgment.

Petitioners argued that they were not barred by Section 518(c) from challenging the penalties assessed against them because they had never been served with the notices of violation, cessation orders, and notices of assessment of civil penalties. Petitioners claimed that the applicable regulations regarding service of those documents, 30 C.F.R. 722.14 and 723.17—which provide that the documents may be sent by certified mail and that refusal to accept the documents does not make the service invalid[2]—are unconstitutional.

The district court rejected petitioners' argument. It noted that "due process requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " Pet. App. 105 (quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Since this Court has three times stated that notice by mail satisfies the requirements of due process—in *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, 800

---

[2]Section 722.14(a)(2), which governs service of notices of violation and cessation orders, provides that "service may be made by sending a copy of the notice or order by certified mail or by hand to the person to whom it is issued or his designated agent. Service shall be complete upon tender of the notice or order or of the mail and shall not be deemed incomplete because of refusal to accept." Section 723.17(b), which governs service of notices of assessment of civil penalties, provides that such notices may be sent by certified mail and provides that if the certified mail is tendered "at any address at which that person is in fact located, and [the operator] refuses to accept delivery of or to collect such mail, the requirements of this paragraph shall be deemed to have been complied with upon such tender."

(1983); *Greene* v. *Lindsey*, 456 U.S. 444, 455 (1982); and *Mullane*, 339 U.S. at 319—the district court concluded that "service of notice of the violations and penalties by certified mail is reasonably calculated under the circumstances to provide interested parties with notice, as required by due process" (Pet. App. 108). The district court also concluded that petitioners "cannot complain that they received no notice of the documents when they wilfully evaded service" (*id.* at 119). The district court granted the government's motion for summary judgment (*id.* at 114).

The court of appeals affirmed (Pet. App. 74-97). With respect to petitioners' argument that the regulations authorizing service by certified mail violate due process, the court found petitioners' "contentions unpersuasive and affirm[ed] the district court's conclusions" (*id.* at 90).

3. Petitioners argue primarily (Pet. 28-53) that the lower courts erred in rejecting their due process challenge to the regulations regarding service. There is no merit to petitioners' contentions. As the lower courts concluded, petitioners were given notice reasonably calculated to apprise them of the penalties assessed against them. This Court stated in *Greene* v. *Lindsey* that "notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings" especially where, as here, "the subject matter of the action also happens to be the mailing address of the defendant" (456 U.S. at 455). Petitioners made a calculated decision to ignore notices from the Office of Surface Mining in an attempt to avoid their obligations under the surface mining laws. Their decision to refuse to accept the various notices sent to them by certified mail does not render the agency's regulations governing service of notices violative of due process, either generally or as

applied. In the absence of any conflict in the circuits, petitioners present no question warranting review by this Court.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1986

---

[3]Petitioners' claims that equitable principles justify a reduction in the amount of the civil penalty (Pet. 53-65) and that the statute and the regulations violate the Equal Protection Clause (*id.* at 65-70) are manifestly without merit.